Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada),

complainant/applicant,

and

American Cartage Agencies Ltd./Dragon Lady Express Ltd.; and American Cartage Ltd.,

respondents/employers.

Board Files: 29241-C and 29845-C
Neutral Citation: 2013 CIRB **684**
May 28, 2013

The Canada Industrial Relations Board (the Board) was composed of Ms. Elizabeth MacPherson, Chairperson, and Mr. Terence Lineker and Ms. Cindy Oliver, Members.

Counsel of Record

Peter Shklanka, for the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada);

Stephanie Vellins, for American Cartage Agencies Ltd./Dragon Lady Express Ltd. and American Cartage Ltd.

I. Nature of the Complaint and Application

[1] On January 27, 2012, the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada or the union) filed a complaint with the Board

pursuant to section 92 of the *Canada Labour Code* (*Part I Industrial Relations*) (the *Code*), alleging that American Cartage Agencies Ltd. (ACAL) and/or Dragon Lady Express Ltd. (collectively, the employer) had unlawfully locked out the members of a bargaining unit represented by the union and committed a number of unfair labour practices when it laid off those employees and transferred the work to a related, provincially regulated company (Board file no. 29241-C; the 2012 complaint). Following a case management teleconference held on March 12, 2012 and with the consent of the parties, American Cartage Ltd. (American Cartage) was added as a respondent to this complaint.

[2] The processing of this complaint was considerably delayed as a result of the union's numerous and complex requests for the disclosure of information. The employer disclosed a considerable amount of information voluntarily and the Board ordered additional disclosure in July 2012, although it did not acquiesce to all of the union's requests (see *American Cartage Agencies Ltd.*, 2012 CIRB LD 2839). The union sought reconsideration of the Board's decision regarding disclosure (see *American Cartage Agencies Ltd. and American Cartage Ltd.*, 2012 CIRB LD 2917). Ultimately, pleadings with respect to the complaint were completed only as of January 28, 2013.

[3] Subsequent to the filing of its complaint with the Board, the union filed an application with the British Columbia Labour Relations Board (BCLRB), seeking a declaration that ACAL was a single employer with American Cartage, Dragon Lady Express Ltd., Chateau Gloria Enterprises Inc. and Indian River Transport Ltd. for the purposes of the *British Columbia Labour Relations Code* (the *B.C. Code*). In the alternative, the union sought a declaration that there had been a sale of business from ACAL and/or American Cartage to Dragon Lady Express Ltd. and/or Indian River Transport Ltd. The union also sought a declaration that the responding parties had violated sections 6 and 9 of the *B.C. Code*. In a decision rendered on February 1, 2013 (BCLRB No. B33/2013), the BCLRB held that it would defer consideration of the union's application until such time as this Board determined the matters related to the federal certification order.

[4] On February 26, 2013, the union filed an application with the Board seeking a declaration as to the entities bound by its federal certification order and a determination as to whether some or

all of those entities ceased to fall within federal jurisdiction following ACAL's cessation of its extra-provincial operations in February 2012 (Board file no. 29845-C; the 2013 application).

[5] The union has requested that the Board hear the 2012 complaint and the 2013 application together. The employer agrees that, given the overlap in the background facts, the parties' respective submissions and documents in the 2012 complaint should be considered by the Board with respect to the 2013 application, but objects to any further delay in the determination of the 2012 complaint.

[6] The Board has determined that, given the commonality of evidence in the two matters now before it, it is appropriate that the 2012 complaint and the 2013 application be heard together pursuant to section 20 of the *Canada Industrial Relations Board Regulations, 2012* (the *Regulations*).

II. Background and Facts

[7] The CAW-Canada was certified to represent a unit of owner/operators and company drivers employed by ACAL on July 27, 2007 (Board order no. 9318-U). Prior to that date, these employees had been represented by the Teamsters Local Union No. 31 (Teamsters 31).

[8] The Board's records indicate that ACAL was originally incorporated as Dartford Enterprises Ltd. in December 1976. The company changed its name to ACAL as of April 1, 1977. At the time, ACAL indicated that its primary business involved the pick-up and delivery of containers between deep-sea ports in the state of Washington, USA and Vancouver, British Columbia. On the basis of this information, the then Canada Labour Relations Board (CLRB) found that the company was in federal jurisdiction for labour relations purposes.

[9] The records indicate that the owner of ACAL also owned a separate company, Sea-Van Enterprises Inc. (Sea-Van), which entered into verbal contracts with a number of owner/operators for the use of ACAL's licences and running rights. The original certification order issued to Teamsters 31 by the CLRB in September 1988 identified ACAL and Sea-Van as a single employer for the purposes of the *Code*. At the time, the CLRB's Investigating Officer's report also indicated that there was an existing certification order issued by the BCLRB to the General Truck Drivers and Helpers Union, Local No. 31 for a unit of employees of "American

Cartage Agencies Ltd. and American Terminals Ltd." The Board's records indicate that the BCLRB order was originally issued in April 1965 and was varied in November 1982.

[10] The CLRB's 1988 certification order for the owner/operators working for ACAL/Sea-Van was revoked in 1991 as a result of a decertification petition. However, in May 1993, Teamsters 31 applied to again represent the owner/operators at ACAL/Sea-Van. The Investigating Officer's report prepared at the time indicated that, due to economic circumstances in 1990–91, ACAL had ceased its extra-provincial operations, although it retained its licenses to perform this work. At the time of the 1993 application, ACAL was mainly engaged in off-loading containers from the Vancouver docks for distribution within the Greater Vancouver area, but held itself out as ready, willing and able to transport containers to and from locations outside of the province. Despite the absence of any evidence that ACAL and/or Sea-Van were actively engaged in extra-provincial transportation at the time, the CLRB issued a certification order in June 1993 in favour of Teamsters 31 for a unit of owner/operators working for ACAL/Sea-Van (Board order no. 6241-U).

[11] In October 2006, as a result of customer demand, ACAL acquired 10 tractors and hired company drivers to drive these vehicles (see *Randhawa*, 2010 CIRB 487). ACAL/Sea-Van voluntarily recognized Teamsters 31 as the bargaining agent for these company drivers. In May 2007, when the CAW-Canada filed the second of two applications to displace Teamsters 31 as the bargaining agent for the owner/operator unit, all parties agreed that the company drivers should be in the same bargaining unit as the owner/operators. Although the employer was represented by legal counsel during these proceedings, no issue was raised as to the identity of the drivers' employer or the Board's jurisdiction to deal with the application.

[12] In the course of its consideration of the CAW-Canada's 2007 certification application, the Board's investigating officer reported that Sea-Van no longer existed. Accordingly, the only employer named in the Board's July 2007 certification order (9318-U) was ACAL.

[13] The CAW-Canada and ACAL entered into a collective agreement for the period January 1, 2009 to June 30, 2010. Following a lockout of the bargaining unit in April 2011, the parties entered into a new collective agreement with an expiry date of June 30, 2012.

[14] On September 12, 2011, ACAL changed its name to Dragon Lady Express Ltd. (Dragon Lady). Dragon Lady states that it currently has a fleet of two leased trucks that are used to provide overload services to other trucking firms. Dragon Lady contends that the drivers represented by the CAW-Canada are in fact employed by a related company, American Cartage, and that American Cartage has been the true employer of the drivers since at least 2004. Dragon Lady submits that it has a separate operating license from those used by American Cartage.

[15] On January 18, 2012, American Cartage sent a letter to the CAW-Canada advising the union that on Friday, January 20, 2012, it would be issuing notices of lay-off to the 43 owner/operators and company drivers represented by the union. The letter indicated that the company had been operating at a loss and that the bank had called in its loans. The letter concluded that the owner had "no alternative but to close American Cartage, at least for the time being."

[16] American Cartage Ltd. ceased operations on February 3, 2012 and the owner/operators and drivers were laid off as of that date.

III. Issues

[17] The Board held a case management conference call with the parties regarding the union's 2012 complaint on March 12, 2012. Following that call, the Board indicated to the parties that the issues for determination in that matter were:

> (1) the identity of the true employer of the employees in the bargaining unit represented by the CAW-Canada (American Cartage Ltd. or ACAL/Dragon Lady); and
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> (2) the motive(s) for the lay-off of the bargaining unit members in 2012 (and consequently whether such lay-off constituted an unlawful lockout within the meaning of the *Code*).

[18] As a result of the union's 2013 application, the Board is also being called upon to determine whether it continues to have jurisdiction over any of the employers' operations.

IV. Positions of the Parties

A. The Union

[19] The union submits that Dragon Lady is the former ACAL, and is subject to the collective agreement between CAW-Canada and ACAL. The union submits that American Cartage is the current name of the company previously known as Sea-Van Enterprises Ltd. It points out that the owner of ACAL/Dragon Lady, Mrs. Gloria Vander Schaff, is the only registered director and officer of American Cartage. The same individual is also the owner of Chateau Gloria Enterprises Inc., which owns a number of trailers that it has leased to Dragon Lady and to a company owned by one of Mrs. Vander Schaff's relatives, Indian River Transport Ltd.

[20] The union asserts that American Cartage is laying off unionized employees and transferring their work to its related, non-union operations. It further asserts that the purpose of this action is to undermine the union and to obtain concessions that the employer was unable to obtain from the union in the 2011 round of collective bargaining. The union claims that Mrs. Vander Schaff closed American Cartage in order to avoid her obligations to the union and the employees. It submits that the closing of the business was tainted with anti-union animus and that the lay-offs constitute an unlawful lockout of the union members and an unfair labour practice.

[21] The union explains that, during the round of collective bargaining that resulted in the current collective agreement, the employer had been demanding significant concessions from the union. Ultimately, the employer locked out the bargaining unit in April 2011. The union states that, even after ratification of a Memorandum of Agreement, the employer continued to take steps to undermine the union's bargaining authority and to violate the collective agreement. It alleges that the January 2012 lay-off notices were intended to compel employees to accept less favourable terms and conditions of employment.

[22] The union requests that the Board determine that American Cartage and ACAL/Dragon Lady are both bound by the CAW-Canada's federal certification order. It alleges that Dragon Lady is operating trucks using non-union drivers. It argues that, by laying off unionized employees and transferring work to a related non-union company, the employer has engaged in an unlawful lockout, has interfered with the union's representation of its members, and has

sought to compel its employees to cease to be members of the CAW-Canada, contrary to the *Code*.

[23] The union contends that, when ACAL/Dragon Lady ceased providing extra-provincial transportation services, it concurrently ceased to be subject to federal jurisdiction for labour relations purposes and, from that point forward, the employer was subject to provincial jurisdiction. It seeks a declaration from this Board that ACAL/Dragon Lady does not currently operate in federal jurisdiction.

[24] The union also requests that Sea-Van Holdings Inc., the parent company of ACAL/Dragon Lady and American Cartage, and its owner, Mrs. Gloria Vander Schaaf, be added as parties to the Board's proceedings.

[25] The union submits that the Board erred in narrowing the issues for determination with respect to its 2012 complaint and that the disclosure ordered by the Board and provided by the employer has been inadequate to allow it to make its case. It also submits that there are issues of credibility and employer motive that should cause the Board to hold an oral hearing.

B. The Employer

[26] The employer asserts that, since 2004, the true employer of the owner/operators and company drivers has been American Cartage and not ACAL. It submits that American Cartage holds the operating licences used by the members of the bargaining unit and that it was simply an oversight by both parties that the certification order and the collective agreement were not updated to reflect this change.

[27] The employer submits that, until February 3, 2012, American Cartage was engaged in regularly and continuously providing daily cross-border transportation services under contract to IKO Industries. It contends that American Cartage was therefore properly within federal jurisdiction for labour relations purposes. The employer states that the last run performed for IKO Industries took place on February 3, 2012, which was also the date on which American Cartage laid off its drivers and office staff and ceased providing transportation services. American Cartage admits that it continued to operate a non-union maintenance shop for approximately one month following the closure of its core transportation business, but asserts

that the company is no longer in business. By letter dated May 30, 2012, WorkSafeBC confirmed that it had cancelled workers' compensation coverage for American Cartage. The employer also provided a printout from the Pacific Gateway Portal indicating that American Cartage is no longer recognized as a valid carrier.

[28] The employer admits that a lockout took place in April 2011 when the parties' were engaged in collective bargaining for renewal of the agreement that expired June 30, 2010, but denies that the lay-offs that took place in February 2012 were intended to undermine the union or compel the employees to accept less favourable terms and conditions of employment than those they had agreed to in the April 9, 2011 Memorandum of Agreement.

[29] The employer states that the reason for the lay-off notices was because the bank had called its loan and would no longer fund the company's operating line of credit. Copies of the letters to American Cartage from the bank's solicitors dated January 17, 2012 and January 30, 2012 were provided to the union and the Board.

[30] The employer asserts that, although the lay-off notices were issued at a time when the company was considering its financial ability to remain in business absent funding from the bank, the employer has not sought any concessions from the union in order to remain in operation. The employer denies that American Cartage transferred any work to Dragon Lady.

[31] The employer claims that, until it was renamed as Dragon Lady in September 2011, ACAL was a "shelf" company that did not maintain a bank account or issue paycheques to the union's members. It states that Dragon Lady has two leased trucks and is now an "overload" company that provides services to any trucking entity in need of its services. Dragon Lady has its own operating licences, separate from those of American Cartage. The employer claims that Dragon Lady has no collective bargaining relationship with CAW-Canada.

[32] The employer submits that the Board has properly characterized the issues to be determined with respect to the 2012 complaint. It asserts that it has provided comprehensive disclosure to the union and that the written record is sufficient to allow the Board to deal with the 2012 complaint and the 2013 application.

V. Analysis and Decision

[33] Having reviewed the written submissions of the parties with respect to the 2012 complaint and the 2013 application, the Board is satisfied that an oral hearing is not required and exercises its discretion under section 16.1 of the *Code* to decide these matters without an oral hearing.

A. Who is the true employer of the employees in the bargaining unit represented by the CAW-Canada and is that entity bound by CIRB certification order no. 9318-U?

[34] On the basis of the information now available, it appears that the Board was misinformed in 2007 when it issued the CAW-Canada's certification order naming ACAL as the sole employer. At that time, the Board was informed that Sea-Van no longer existed. Documents provided by the employer in the context of this proceeding reveal that Sea-Van Enterprises Inc. changed its name to "American Cartage Ltd." on November 10, 2004. Under this new name, American Cartage carried on the business formerly performed by Sea-Van, including entering into contracts with drivers for the use of ACAL's licences and running rights and/or tractors and trailers owned by Sea-Van Holdings Inc. The evidence also reveals that American Cartage held non-exclusive licences issued by the Vancouver Port Authority (VPA) that allowed it to operate within the VPA properties, and that the owner/operators are and were paid by American Cartage, rather than ACAL.

[35] Had the Board been in possession of this information in 2007, it would likely have found American Cartage and ACAL to be a single employer, in the same manner that ACAL and Sea-Van had been treated as a single employer when the employees were represented by Teamsters 31, and the CAW-Canada's certification order would have been framed accordingly.

[36] For the purposes of this proceeding, the Board therefore declares that, at the time of the CAW-Canada's certification as bargaining agent for the drivers unit in July 2007, ACAL and American Cartage were a single employer. American Cartage therefore was bound by the collective agreement between ACAL and the CAW-Canada applicable to the employees in the bargaining unit described in Board order no. 9318-U. The Board understands that, over the intervening years, the parties themselves have not distinguished between ACAL and American Cartage with respect to their labour relations and/or the employers' obligations under the *Code*

and the collective agreement. Therefore, this declaration merely serves to formalize the *de facto* relationship that existed between the parties and is not intended to impose any new obligations, financial or otherwise, on any of the parties.

[37] The evidence before the Board also demonstrates that American Cartage ceased operations on February 3, 2012. As of that date, American Cartage laid off its drivers and office staff and ceased providing transportation services. It no longer has any employees or permits to access the Vancouver Port Authority premises. While ACAL/Dragon Lady continues to operate, the work it has engaged in since February 3, 2012 has been performed entirely within the province of British Columbia. ACAL/Dragon Lady currently has no licences or permits that would allow it to operate inter-provincially or internationally. Consequently, since that date, there is no basis on which the Board can continue to assert federal jurisdiction over ACAL/Dragon Lady.

[38] In this regard, the situation is similar to that at issue in *Pacific Coach Lines Ltd.*, 2012 CIRB 623 (*PCL 623*). In that case, the Board initially found that the employer, Pacific Coach Lines Ltd. (PCL), was providing extra-provincial bus services and was therefore in federal jurisdiction for labour relations purposes. Subsequent to this determination, PCL ceased providing extra-provincial services and gave up its licences to do so. The Board was of the opinion that, under these circumstances, it was obligated to revisit the issue of its jurisdiction over PCL prior to dealing with the union's application for a declaration of single employer and unfair labour practice complaint. In *PCL 623*, *supra*,the Board determined that once PCL ceased its extra-provincial activities, it was no longer subject to the *Code*:

> [97] As the Board noted in *PCL 2427*, in order to find federal jurisdiction, the facts must establish that the employer makes extra-provincial trips on a regular and continuous basis (*Pioneer Truck Lines Ltd.*, 1999 CIRB 31; *Autocar Royal (9011-4216 Quebec Inc.)*, 1999 CIRB 42; and *Acadian Lines Limited* (1994), 96 di 41 (CLRB no. 1094)). In view of the changes that PCL has implemented, the Board is compelled to find that it has lost jurisdiction over PCL and that the company has reverted to provincial jurisdiction for labour relations purposes.

[39] On judicial review, the Federal Court of Appeal upheld the Board's decision (*National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada, Local 114)* v. *Pacific Coach Lines Ltd.*, 2012 FCA 329), stating:

> [21] We agree with the Board that the jurisdictional issue is a threshold question. The Board could not proceed with the application without asking itself whether or not it had the constitutional authority to make an order affecting PCL. The facts of the case as they stood in front of the Board when the question arose could not be ignored.
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> ...
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> [25] In our view, the Board instructed itself correctly with respect to the applicable law and applied the correct analytical framework to the questions at issue. The Board's decision is comprehensive and well-reasoned. On the evidence, it was open to the Board to conclude as it did and we have found no errors of principle or of fact warranting our intervention. As a result, the Board correctly declined jurisdiction and, on that basis, was right to dismiss the application for a declaration of single employer and the unfair labour practice complaint filed by the Union.

[40] In the instant case, the Board finds that, on the basis of the evidence before it, it no longer has jurisdiction over ACAL/Dragon Lady. In addition, the union has failed to make out a case that the Board has jurisdiction over Sea-Van Holdings Inc., the parent company of ACAL/Dragon Lady and American Cartage. The Board therefore dismisses the union's request to add Sea-Van Holdings Inc. and its owner, Gloria Vander Schaaf, as parties to the Board's proceedings.

[41] As a consequence of its determination that ACAL/Dragon Lady is no longer subject to federal jurisdiction for labour relations purposes, the Board concludes that the union's existing federal certification order (Board order no. 9318-U), which names ACAL as the employer, is presently of no force and effect. This order will remain dormant so long as Dragon Lady does not engage in any extra-provincial transportation activities.

B. Did the lay-off of the members of the CAW-Canada's bargaining unit in February 2012 constitute an unfair labour practice and/or an unlawful lockout within the meaning of the *Code*?

[42] The union has alleged that American Cartage laid off unionized employees and transferred work to its related, non-union operations in order to undermine the union and obtain concessions that it had been unable to obtain from the union in the 2011 round of collective bargaining. It submits that the closing of the business was tainted with anti-union animus and the lay-offs constitute an unlawful lockout of the union members and an unfair labour practice.

[43] The employer denies that the lay-offs that took place in February 2012 were intended to undermine the union or compel the employees to accept less favourable terms and conditions of employment than those they had agreed to on April 9, 2011. It states that the motive for the lay-

off notices it issued was the bank's decision to call its loan and terminate the company's operating line of credit. At that point in time, the owner was trying to determine if she could continue to operate the company without the bank's support. She subsequently determined that she could not, and closed the business.

[44] The employer does not deny that it attempted to obtain concessions from the union during the collective bargaining that took place in 2010–2011. At the time, the employer's concern was expressed not only to the union, but to the employees and the Vancouver Port Authority. In the view of American Cartage's owner, there were too many trucking companies, many of whom were non-union, chasing the same work, and her company could not compete while continuing to pay full union rates. American Cartage warned the union and its members that it was in a dangerous financial situation and that, in the event of a labour dispute, it might have to permanently shut down the business.

[45] Although the parties signed a Memorandum of Agreement in April 2011, the employer continued to experience financial difficulties. It approached the union for relief from some of the contractual provisions in May 2011, and requested meetings with the drivers and owner/operators to make them aware of the situation. The union refused to entertain any further concessions, stating its position that "the collective agreement stands as agreed."

[46] Motive is a critical element in the various unfair labour practice complaints that the union alleges have taken place. The Board appreciates that, at the time the union filed its unfair labour practice complaint in January 2012, the lay-off notices had not yet taken effect, and the union was speculating that the employer had issued them solely as another tactic in its ongoing campaign to obtain concessions from the union and its membership. However, subsequent events do not support the union's allegation that the employer's motive for its January 2012 decision and actions was unlawful.

1. Alleged Unlawful Lockout

[47] "Lockout" is defined in section 3 of the *Code* as follows:

> "lockout" includes the closing of a place of employment, a suspension of work by an employer or a refusal by an employer to continue to employ a number of their employees, done to compel their

employees, or to aid another employer to compel that other employer's employees, to agree to terms or conditions of employment.

[48] Such activity, if undertaken at any time other than those authorized by the *Code*, is *prima facie* unlawful.

[49] In the instant case, although American Cartage has clearly closed a place of employment, the Board is not persuaded that this action was taken to compel the employees to agree to new terms or conditions of employment. At no time subsequent to the date on which the lay-off notices were issued did the employer seek any concessions from the union in an effort to maintain its operations. The evidence provided by the employer has persuaded the Board that the lay-off notices and subsequent closure of American Cartage were due to the company's financial circumstances and not for any other or unlawful motive.

[50] Accordingly, the Board is unable to find that the employer's actions constituted an unlawful lockout and dismisses the complaint of unlawful lockout.

2. Alleged Unfair Labour Practices

[51] The union also alleged that the employer's actions interfered with the union's representation of the employees, contrary to section 94(1)(*a*) of the *Code*; threatened employees because they were members of the union, contrary to section 94(3)(*a*) of the *Code*; and sought by intimidation or coercion to compel its employees to cease to be members of the CAW-Canada, contrary to section 96 of the *Code*. These provisions read as follows:

> 94. (1) No employer or person acting on behalf of an employer shall
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> (*a*) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; or
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> ...
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> 94. (3) No employer or person acting on behalf of an employer shall
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> (*a*) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person
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> (i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,
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> (ii) has been expelled or suspended from membership in a trade union for a reason other than a failure to pay the periodic dues, assessments and initiation fees uniformly required to be paid by

all members of the trade union as a condition of acquiring or retaining membership in the trade union,

(iii) has testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part,

(iv) has made or is about to make a disclosure that the person may be required to make in a proceeding under this Part,

(v) has made an application or filed a complaint under this Part, or

(vi) has participated in a strike that is not prohibited by this Part or exercised any right under this Part.

...

96. No person shall seek by intimidation or coercion to compel a person to become or refrain from becoming or to cease to be a member of a trade union.

[52] The union has not provided any specifics as to how the lay-off notices violated these provisions of the *Code*. Instead, the union alleges a "pattern of conduct" by the employer over the years that it invites the Board to use as a basis for drawing the conclusion that the employer's motives for the lay-off notices, and the subsequent closure of the company, were improper. This pattern of conduct includes the employer's demands for concessions during collective bargaining; its alleged support for a displacement application filed by another union; the legal lockout of employees during bargaining in 2011; the employer's alleged failure to comply with the terms of the new collective agreement; the dismissal and subsequent arbitral reinstatement of the union president; and calling meetings with the drivers and threatening to shut down operations.

[53] The union maintains that the closure of the company constitutes unlawful interference pursuant to section 94(1)(*a*) and unlawful conduct pursuant to section 96 of the *Code*. It asserts that the owner was able to allocate assets and funds among the various companies that she owns in a manner that allowed her to claim that American Cartage was in dire financial straights, although her business empire as a whole was not in peril. It points out that this is not a case where creditors petitioned the employer into bankruptcy, but a closure of the one unionized company in a group of related companies. The union challenges the explanation given for the closure, and submits that the decision was tainted by anti-union animus. It relies on the alleged "pattern of conduct" described above as evidence of the employer's improper motive.

[54] Seen through the union's eyes, the 2012 lay-offs would appear to be simply one more effort by the employer to obtain concessions from the union and its members through threats and

intimidation. Seen through the employer's eyes, the sequence of events identified by the union can be viewed as the desperate efforts of a company facing intense competition to obtain relief from its financial obligations and to draw the union and the employees' attention to the seriousness of the situation.

[55] Under the circumstances, the Board has not been persuaded that the employer's actions were undertaken to avoid its collective bargaining obligations and to punish the union and its members for asserting their rights under the *Code*, as the union alleges. Subject to any constraints that it has agreed to in a collective agreement, an employer is entitled to review its operations and to reorganize or shut down unprofitable activities. Despite the pattern of conduct alleged by the union, the Board is not persuaded that the decision to shut down American Cartage's operations was taken for a purpose other than *bona fide* business reasons or that it was tainted by anti-union animus. The complaints of violation of sections 94(1)(*a*) and 96 of the *Code* are therefore dismissed.

[56] The Board notes that complaints alleging violation of section 94(3) of the *Code* are subject to a reverse onus; thus the burden is on the employer to prove that the failure to comply with this subsection did not occur. On the basis of the evidence provided, the Board is satisfied that the events complained of, namely the issuing of lay-off notices and the subsequent closure of the business and lay-off of the union members, were taken for *bona fide* business reasons and therefore did not constitute a violation of section 94(3)(*a*) of the *Code*. The complaint is therefore dismissed.

[57] The Board's files in these matters are now closed.

Elizabeth MacPherson
Chairperson

Terence Lineker
Member

Cindy Oliver
Member